No. 1086.

IN THE

United States

Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

Los Angeles Traction Company.
(a corporation),
Plaintiff in Error,
vs.
John Martin Connealy, et al.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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Brief of Defendants in Error.

There is no claim made by plaintiff in error that the verdict and judgment are not justified by the evidence; that is to say, it is apparently conceded that there is substantial conflict in the evidence, so that under the settled rule the verdict is to that extent to be regarded as final. The only errors urged in this court are said to lie in the instructions given to the jury and the refusal of certain instructions duly requested by plaintiff in error, but refused by the learned judge presiding at the trial, except

in so far as they are embodied in the written instructions given. [Tr., p. 55.]

Before taking up the argument in behalf of defendants in error we wish to direct attention to some features of the evidence which perhaps have not been quite as fully developed in the statement of the case made by plaintiff in error as the evidence seems to us to justify.

First, as to the suggestion of possible intoxication or excessive stimulation of deceased, frequent references to which are made in the brief as bearing upon the question of contributory negligence. It is not disputed that prior to his death the deceased was strong and healthy, hard working and industrious, with a good business capacity, engaged in the dairy business, and thirty-seven years of age. [Tr., pp. 99, 100.] There can be no dispute of the fact appearing from the evidence that during the evening before the accident deceased had several drinks of whisky and beer, but there is not one word of evidence tending to show that this was more than deceased was used to taking or that he was appreciably affected thereby. In fact, it is positively testified by those who were with and saw deceased during the evening that he was sober, and even the testimony of the motorman, Stone, suggests that deceased's companions were sober. [Tr., pp. 114, 115.] Of course, there was the odor of liquor on deceased's breath after the accident, but it does not seem improper to suggest that this would probably be the case if less drinks had been taken by him than he had, or only one. Again, it appears that he asked the witnesses Hood and Paggi for a match to light his cigar, at 30th and Figueroa streets. [Tr., pp.

89, 95.] This may be considered as indicating a normal condition of mind. The only other evidence bearing at all on this question is that of the motorman to the effect that just before the collision deceased's horse was on a gallop, but we submit this is not necessarily any evidence of over-stimulation of the driver, and would only be susceptible of an inference at most. We think there is nothing in the record to sustain the intimations of counsel that the deceased was not in a rational and normal condition, fully capable of exercising his faculties, and this was evidently the view taken by the jury. We cannot accede to the proposition advanced by counsel that the fact that a man was drunk certainly destroys any presumption that he was careful, for there is always the instinctive tendency to avoid danger which we think continues even when the faculties are dulled, and it is what a person does or omits that may be careless, not his condition as to sobriety. Moreover, there is no fact in the present case that carries us to the point suggested by counsel, for it must be accepted as established that deceased was not drunk.

Second, as to the evidence bearing on the issue of contributory negligence. There is an entire absence of any evidence as to what deceased did as he approached the tracks. He was not observed by any one until his horse was on the east track and had started across the tracks, when he was first seen by the motorman; then the car was only six or eight feet from the cart, and the horse only six or eight feet from the front of the car. [Tr., pp. 103, 112.] If it is to be assumed that the motorman was attending to his duties and looking ahead, and yet

did not see the cart in which deceased was riding until it was within six or eight feet of the front of the car, surely the inference is justified that deceased could not see the car until then. Or, if, as contended by counsel, the car if unlighted, might have been seen at a distance of about forty yards, what becomes of their theory that the motorman could not stop the car after he could see deceased approaching the track with his horse on a gallop, and so was not guilty of negligence in avoiding the collision by stopping the car?

Harrington v. Los Angeles Railway Co., 140 Cal. 514.

If the evidence is to be considered as justifying the inference that deceased could not and did not see the car until it was within six or eight feet of the point at which he was crossing the tracks, plainly he is not to be charged with contributory negligence in not then stopping, or in urging his horse at a gallop across the track beyond the approaching danger.

It seems unnecessary to cite authority to the proposition that an error of judgment under such circumstances is not negligence.

Counsel's argument as to the probability of the deceased having seen the car when at least forty yards away, is but an inference and unsupported by the evidence of their own witness to the effect that he first observed the cart of deceased when it was close up to the point of collision, and yet to use counsel's own figures, deceased, according to their theory, was in sight of the motorman while the cart was approaching the track

across Vermont avenue for a distance of nearly seventy feet.

But taking the inference that the car was dark, which has evidence to support it [Tr., pp. 85, 86, 91, 92], together with the fact that the night was very dark, moonless and quite foggy, and that there were no street lights at or near the place of collision [Tr., pp. 88, 103], it is readily understood how deceased did not see the car until it was almost upon him. Again, there are the undisputed facts that the car was coasting down grade with the momentum acquired from the power applied when and after it was started and from gravity [Tr. pp. 82,99, 107], and that it was running at an unlawful speed [Tr., p. 106]; these facts, together with the evidence of the witnesses tending to show that the bell or gong was not ringing or rung before the accident as the car approached Jefferson street [Tr., pp. 85, 92], clearly justify the inference that deceased did not and could not know of the approaching car until just before it struck his cart.

We have called attention to these matters for the purpose of emphasizing the claim of defendant in error that there is an entire absence of evidence as to the conduct of deceased in approaching the tracks and no evidence of what he did just before the accident until he was within six or eight feet of the car, and the collision imminent. This brings us to the first specification of error.

ARGUMENT.

I.

(A.) The first three subdivisions of the argument as to specification I are directed to the point that the instruction complained of was erroneous in that it charged the jury that deceased was presumed to have stopped, looked and listened before crossing the west track, and special fault is found with the inclusion within the presumption of stopping.

As we understand the law applicable generally to travelers on the highway approaching the crossing of railroad tracks, a duty is imposed on such traveler to exercise ordinary care to avoid injury while crossing, and this involves looking and listening for approaching trains or cars. The circumstances of each case must determine what is necessary to constitute ordinary care and reasonable prudence, and, if from any reason looking and listening without stopping may not be effective to ascertain the possibility of danger, then it becomes his duty to stop in order to make his observations reasonably adequate to the conditions.

Cincinnati, N. O. & T. P. Ry. Co. v. Farra, 13 C. C. A. 602, 66 Fed. 496.

Shatto v. Erie R. Co. (C. C. A. 6th cir.), 121 Fed. 678, 681.

Railroad Co. v. Ives, 144 U. S. 408, 417, 36 L. ed. 485.

Elliott on Railroads, Sec. 1167.

And that this obligation to stop may attach to the

crossing of a street railway, see the opinion of this court in

Tacoma Ry. & Power Co. v. Hays, 110 Fed. 496, 500.

Applying these principles it is apparent that ordinary care in crossing a railway track consists in looking and listening, and when necessary stopping to do so, before crossing. These three things are prescribed by the law as a rule of conduct equivalent to ordinary care in such cases. In a case where the evidence should show that the injured person actually saw or heard the approaching car and attempted to cross before it should pass, there would be involved the additional element of prudence in so attempting, for the traveler in the highway is not bound to give precedence to the car of a street railway.

Clark v. Bennett, 123 Cal. 275.

But there is no such fact present in the case at bar, nor is there any evidence from which a reasonable inference could be made that deceased did see the car and notwithstanding its approach attempted to cross before it, for as we have stated, the evidence shows that he was not sighted by the motorman until the car was almost upon him.

There is another circumstance which should be considered in judging the absence of any evidence of reckless conduct on his part, and that is that his traveling companions had preceded him across Vermont avenue at a distance of about thirty or thirty-five yards and, assuming with plaintiff in error that deceased could see them, had given no sign of

approaching danger. This circumstance, taken with the evidence tending to prove that the car was coasting, was not lighted nor its bell sounding, may well be said to have misled deceased into a belief that he could continue across Vermont avenue without danger, and under such circumstances his conduct would not be negligent.

White v. Southern Pacific Co., 122 Cal. 305.

We think the instruction criticized was eminently proper and fair, for it includes all the things which might have been required of deceased in the exercise of reasonable care under the circumstances of the case, and is preceded by a correct statement in general terms of the obligation to exercise reasonable care. [Tr., p. 142.] Had the instruction not included the possible necessity of stopping, plaintiff in error might well be heard to complain that it failed to state all of the elements of reasonable care as a general proposition, there being no evidence as to what was done or was necessary. It is in effect and substance a statement of the presumption that in the absence of evidence to the contrary, deceased exercised reasonable care.

The comment that this instruction plaintly implies that the deceased is presumed to have stopped, looked and listened after crossing the east track and immediately before his horse stepped upon the west track, seems to us hypercritical. The cart of the deceased was struck by a car running on the west track. This then was the point of danger and the exercise of reasonable care had, of course, to be observed before crossing the track over which the danger was approaching. And the

physical facts present in the case would forbid any such misunderstanding of the instruction by the jury. From the map introduced in evidence as plaintiff's Exhibit "A" [Tr., pp. 82, 83], it appears that the distance between the east and west tracks is a little less than five feet, while it is in evidence that the distance from the nose of the horse to the rear of the car was about ten feet [Tr., p. 97], so that it was physically an impossibility for deceased to have stopped after leaving the east track and before his horse stepped upon the west track.

The instruction properly directed attention to the point of danger as the place before reaching which deceased must exercise reasonable care to avoid an accident.

As finally and conclusively disposing of the objections of plaintiff in error, we rely on the case of Baltimore & Potomac Railroad Co. v. Landrigan, decided by the Supreme Court, Dec. 1903, and reported in the advance sheets of the Lawyers' Edition of the United States Supreme Court Reports, Jan. 15, 1904. It is true there are some facts in that case different from the one at bar, but we are unable to appreciate the force of the attempt made to entirely distinguish it so that the general principles of the instruction approved would not apply. In that case there was evidence that there was a light in the vestibuled platform of the car which would be noticeable to a person looking toward the car. The court said regarding the instruction under consideration:

"There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in Texas & P. R. Co. v. Gentry,

163 U. S. 353, 366, 41 L. Ed. 186, 192, 16 Sup. Ct. Rep. 1104. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions based on human feelings or experience that have surer foundations than that expressed in the instruction objected to. But, notwithstanding the incentives to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse nor does it distinguish between the degrees of negligence.

"This was the ruling in Northern P. R. Co. v. Freeman, 174 U. S. 379, 43 L. Ed. 1014, 19 Sup Ct. Rep. 763, the case which plaintiff in error opposes to Texas & P. R. Co. v. Gentry. In the Freeman case a man thirty-five years old, with no defect of eyesight or hearing, familiar with a railroad crossing, and driving gentle horses, which were accustomed to the cars, approached the crossing at a trot not faster than a brisk walk, with his head down, looking at his horses, and drove upon the track, look 'straight before him, without turning his head either way.' This was testified to by witnesses. There was direct evidence, therefore, of inattention. There was no such evidence in this case, and the instructions given must be judged accordingly. The court did not tell the jury that all those who cross railroad tracks stop, look, and listen, or that the deceased did so, but that, in the absence of evidence to the contrary, he was presumed to have done so, and it was left to the jury to say if there was such evidence. The instruction was a recognition of 'the common experience of men,' from which it was judged in the Freeman case, that the deceased had not looked or listened, and submitted to the jury that which it was their constitutional duty to decide. And there was enough evidence to justify dispute, and from which different conclusions could be drawn."

In Hemingway v. Illinois Central R. Co. (C. C. A., 5th cir.), 114 Fed. 843, it is said: "In the absence of

all evidence on the subject, it would not be presumed that the deceased did not exercise proper care for he had the greatest incentive to caution to protect his own life." (Citing Improvement Company v. Stead, 95 U. S. 161, 24 L. Ed. 403.)

(B.) The fourth and fifth subdivisions of the argument under this specifiaction may be answered by assuming in favor of the position taken by plaintiff in error that the intsruction in effect indicates the court's opinion on a question of fact, and were this true and the case in the California State courts the objection might be entitled to serious consideration, but the prohibition of the California Constitution (Art. VI, Sec. 19) does not control the Federal courts in cases tried therein.

In Nudd v. Barrows, 91 U. S. 426, 23 L. Ed. 286, it is held that a presiding judge of a Federal court may comment on the evidence and express his opinion upon a question of fact irrespective of what may be the practice in the State court wherein the Federal court is sitting.

And in Pennsylvania Mut. L. Ins. Co. v. Mechanics' Sav. Bank & T. Co., 19 C. C. A. 286, 72 Fed. 413 (Affirmed on rehearing, 19 C. C. A. 316, 73 Fed. 653), it is held that a charge as to presumptions is more or less in the nature of a comment on the evidence, the scope of which is within the discretion of the presiding judge.

There are many cases to the same effect and for convenience we refer to Vol. II, page 188, of Rose's Notes on United States Reports, where, in the note to Vicksburg, etc., R. R. v. Putnam, 118 U. S. 545, 30 L. Ed. 257, on the point that a Federal judge may comment on

facts, if ultimately submitted to the jury, though State law forbid, the annotator says that this is approved in United States v. Philadelphia, etc., R. R., 123 U. S. 114, 31 L. Ed. 139; Rucker v. Wheeler, 127 U. S. 93, 32 L. Ed. 106; California Ins. Co. v. Union Compress Co., 133 U. S. 417, 33 L. Ed. 738; Baltimore, etc., R. R. v. Fifth Baptist Church, 137 U. S. 574, 34 L. Ed. 787, and Van Gunder v. Virginia, etc., Iron Co., 52 Fed. 856, all reaffirming rule; Hathaway v. East Tennessee, etc., R. R., 29 Fed. 492, and United States v. Hall, 44 Fed. 880, 10 L. R. A. 332, both disregarding Georgia statute forbidding judge to express an opinion; St. Louis, etc., Ry. v. Vickers, 122 U. S. 363, 30 L. Ed. 1161, though State Constitution forbids charging jury. Hughey v. Sullivan, 80 Fed. 75, holding Federal practice as to new trials, not affected by State laws; Lincoln v. Power, 151 U. S. 442, 38 L. Ed. 227, even where judge's language shows bias; Doyle v. Boston, etc., R. Co., 82 Fed. 873, no matter how strongly opinion be expressed.

Abbott in his exhaustive work on Civil Jury Trials (Abbott's Trial Brief) states the latitude in instructing on presumptions, at page 441, as follows:

"It is error to refuse to state to the jury what is the presumption of law on a material point in the absence of proof, though the adverse party has already introduced evidence sufficient to sustain a verdict contrary to such presumption, if such evidence be not sufficient to require the jury to find contrary to the presumption."

(Citing Potter v. Chadsey, 16 Abb. Pr. 146.)

Also Durant v. Burt, 98 Mass. 161, holding that a statute prohibiting a judge from charging on a matter of fact does not forbid his instructing them that a pre-

sumption arising in the case is entitled to great weight.

It was certainly within the discretion of the trial judge to indicate to the jury by this instruction that there was, in his opinion, substantially no evidence that the deceased was under the influence of the drinks he had taken, and that so far as the evidence was concerned there was no showing made of contributory negligence, if the instruction be regarded as amounting to this. And clearly was the jury told that the presumption of the exercise of reasonable care in the absence of all evidence tending to show contributory negligence, might be rebutted by circumstantial evidence. Then they were instructed that it was a question for them whether the facts and circumstances proved in the case rebutted that presumption, and if they found that they did, they should find that deceased did not stop and look and listen; but if the facts and circumstances failed to rebut such presumption, then they should find that he did so stop and look and listen. Further, that in order to justify them in finding that he did not, all evidence tending to show that should be weightier in the minds of the jury than that tending to show to the contrary.

This left it to the jury to determine whether from the facts and circumstances proved in the case they believed that deceased was guilty of contributory negligence. Plainly, this left to them the decision of the issue tendered by the answer and equally plain is it under the cases cited that the court did not exceed its power in directing them to consider the presumption in arriving at a conclusion.

Lawson in Presumptive Evidence, Rule 120.

There is no direct evidence tending to show contributory negligence; all that plaintiff in error seems to contend for is that the jury might have *inferred* such negligence from the evidence. It seems apparent that the defendants in error were entitled to the instruction of presumption under such condition of the evidence, aside from the discretionary right of a Federal judge to indicate an opinion thereon. The cases relied on by plaintiff in error do not seem to go further than that where there is direct evidence of contributory negligence the presumption of care should not be entertained, and, with the qualification that such direct evidence must be reasonably sufficient to overcome the presumption, we have no quarrel with the proposition, but here, as pointed out, there is an absence of direct evidence of contributory negligence, and it is under just such a condition of proof that the presumption of care is to be considered.

We suggest that as the cases relied on by counsel for plaintiff in error are apparently from jurisdictions in which the burden of showing a freedom from contributory negligence is in the plaintiff, it would scarcely follow that the view there taken of the necessary showing to avoid the application of the presumption of care in the absence of all evidence to the contrary, would properly control the discretion of a Federal judge who is not bound by such rule, and who may properly express his opinion on the evidence.

(C.) The sixth subdivision of the argument on this assignment of error is directed to the claimed undue prominence given to the element of presumption in the

criticised instruction, because the jury were also told by the court after this instruction was given that they were "not bound, however, to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number or against a legal presumption or other evidence satisfying their minds."

If, as we believe, defendants in error were entitled to the consideration by the jury of the presumption stated in the instruction, manifestly the further instruction as to the weighing of the evidence and the presumption was entirely proper, as in the most favorable view for plaintiff in error in this case the possible rebuttal of the presumption could only find support from inference, and this would not justify an entire disregard of the presumption against which it was urged; for, notwithstanding the able effort of counsel, we still contend that a presumption is entitled to consideration until it is rebutted by direct evidence as distinguished from inferences which might be drawn from evidence not directly to the point or the circumstances of the case as suggested by all the evidence generally. Moreover, if it be regarded that there was conflicting evidence on the issue of contributory negligence, the presumption would be entitled to consideration under the cases cited by counsel for plaintiff in error.

In Lawson's Law of Presumptive Evidence, Rule 117, is given a definition of a presumption which seems to indicate that the distinction between a presumption and an inference is artificial rather than real and important.

"A 'presumption' is a rule of law that courts or juries shall or may draw a particular inference from a particular fact or from particular evidence, unless, and until the truth of such inference is disproved."

Citing Wallace v. Berdell, 97 N. Y. 13.

Moore v. Hopkins (Cal.), 23 Pac. 318.

Scott v. McNeil, 154 U. S. 34.

Whether the jury be justified in determining an issue upon a presumption because of the absence of direct evidence or from an inference which may be drawn from circumstantial evidence, seems to us unimportant, for in either case resort is had to presumption; in the one case because there is no evidence, and in the other because from certain facts shown, certain other facts or conditions are presumed or inferred.

But as we have sought to show this case is one where there is no evidence of contributory negligence, and so the instruction as to presumption in the absence of evidence was entirely proper and fair.

II.

As to Specification II.

The portions of the charge to which this assignment of error is directed and which portions are quoted on page 9 of the brief of plaintiff in error, are what may be designated as general or stock instructions in civil cases. The first paragraph embraces the principle expressed in Sec. 1847 of the California Code of Civil Procedure to the effect that the jury are the exclusive judges of the credibility of the witnesses, and the subsequent part of this paragraph is no more than a fair statement that in cases of this character their finding is to be based on a

preponderance of evidence uninfluenced by sympathy or prejudice.

The objection to the second paragraph of this instruction seems, however, to be fully answered by the provision of the California statute found in Sec. 2061 of the Code of Civil Procedure, which reads in part as follows:

"The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions; * * *

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds."

And considering the language of this second paragraph in connection with the immediately preceding paragraph, it does not seem to us that the jury could be misled by the use of the words "conviction" or "satisfying," for obviously the two paragraphs would be taken together and the jury would understand that the conviction produced in their minds or the satisfying of their minds was to be by and from a preponderance of the evidence. The use of the word or term "presumption" in this second paragraph is justified by the statutory provision, and aside from this there could be no prejudice to the plaintiff in error for the reason that, as we have sought to show, the trial judge was justified in giving the intsruction on presumption because of the absence of evidence of contributory negligence; or, viewing it as plaintiff in error contends, that there was some

evidence of contributory negligence, the judge would have the right to comment upon its weight in his opinion.

And we further direct attention to Sec. 1835 of the Code of Civil Procedure of this state providing as follows:

"That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence."

It seems unnecessary to suggest that the instructions given to the jury are to be considered together and the effect of the whole regarded in determining whether or not they fairly and fully present the case to the jury for its decision.

And, further, with reference to the use of the term "presumption" in this criticised instruction, the jury was told that this presumption could be overcome by circumstantial evidence and that it was for them to determine whether the facts and circumstances *proved in this case* rebut the presumption. Surely this indicates to them as fully as instructions properly should the application and force of the presumption and what they might consider in determining whether or not it had been overcome.

III.

As to Specifications III, IV, V, VI & VII.

These assignments deal with the refusal of the trial court to give the designated instructions as requested, but it seems to us clear that the charge as a whole includes a very fair general statement of the obligations of the traveler on the highway and the operator of a

street car, and, of course, where the matter of a requested instruction is substantially given in the charge, it is not error for the court to refuse such requested instruction, though the instruction in and of itself may be correct as matter of law.

As to the error in refusing to give the instruction designated under the third assignment of errer, we submit that this would only be strictly proper in a case where the traveler on the highway was on the same street and going either in the same or in the opposite direction as the car, and does not strictly apply to the case of one crossing car tracks from a cross street.

As was said in Buhrens v. Dry Dock, E. B. & B. Ry. Co (N. Y. Supm. Ct. Genl. Term), 6 N. Y. Supp. 224, after discussing the relative rights of street cars and vehicles in highways:

"But, in respect to those points where their car tracks cross other streets, there is no reason and no necessity for giving to vehicles of this description any such exclusive right. Their use of the streets at such points is of precisely the same nature and character as that of other vehicles, and their rights to the street, and the use thereof in respect to other vehicles, are precisely the same as those of other vehicles."

As to the requested instructions, refusal of which is made the subject of assignments IV, V and VI, it seems clear to us that the subject matter of these requested instructions is very fairly included in the charge of the court, and with particular reference to the charge referred to in assignment VI, it does not seem to us that this is applicable to the facts developed by the evidence. The testimony shows that the motorman did not see the cart and deceased until the front of the car was

within six or eight feet of the place of crossing, and, therefore, the instruction suggesting that it was not necessary for the motorman to stop under the circumstances is inapplicable to the facts here in evidence.

As to the alleged error of the court in failing to submit to the jury or to direct the jury's attention to the question whether or not decedent exercised ordinary care in any particular other than the use of his eyes and ears for the purpose of discovering any approaching car, it seems to us, as we have said before, that the charge of the court clearly indicates to the jury that it was incumbent upon the deceased to exercise reasonable care before crossing or attempting to cross, and there is nothing in the instructions which could mislead the jury into assuming that the duty was not a continuing one. In fact, any misunderstanding of the instructions in this respect would be contrary to common sense, for it necessarily follows that as it is the duty of a traveler on the highway to look and listen before crossing the tracks of the railway, he must make his observation effectively, and effective observation, of course, can only be made to the end of avoiding danger; and until the traveler has actually crossed the track he is, of course, not out of danger, and, therefore, his duty to exercise ordinary care is until then a continuing one. We submit that the charge fairly states this element of reasonable care and indicates that a failure to observe these requirements would be contributory negligence.

In the trial of a case, a correct apprehension by the court of all the principles of law involved is not demanded; but it is sufficient if the instructions are correct, as

applicable to the case presented, and that the court should not be wrong to the extent of misleading the jury.

Schutz v. Jordan, 32 Fed. 55.

An instruction that a railroad company is under obligation to brakemen to provide and maintain reasonably and ordinarily safe coupling apparatus on the car used by it, is no ground for reversal when immediately followed by further instructions clearly expressing the qualification that the duty is to use ordinary care in that regard.

Chicago, R. I. P. Ry. Co. v. Linney, 19 U. S. App. 315, 59 Fed. 45.

See also St. Louis I. M. & S. Ry. Co. v. Needham, 69 Fed. 823.

Where the charge of the court, as a whole, fairly presented to the jury the law applicable to the evidence, isolated sentences will not be considered by the appellate court, apart from their context, for the purpose of determining assignments of error thereon.

Thompson v. Northern Pac. R. R. Co. (C. C. A., 9th Cir.), 104 Fed. 501.

When the charge to the jury, taken as a whole, fully and fairly submits the law of the case, the judgment will not be reversed because passages extracted therefrom and read apart from their connection, need qualification.

Baltimore P. N. Co. v. Mackey, 157 U. S. 72, 39 L. Ed. 624.

And we think the following language of the Supreme Court expresses a fair judgment of the charge of the court in the case at bar:

"We see no error in the instruction given to the jury

respecting contributory negligence of the plaintiff. It was full, all the case demanded, and strictly accurate. Sentences may, it is true, be extracted from the charge, which if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled. Upon the whole, we think the case was submitted in a manner of which there is no just cause of complaint."

Evanston v. Gunn, 99 U. S. 668, 25 L. Ed. 306, 308.

In conclusion we wish to emphasize one feature of this case which it seems proper to urge upon this court, and that is that no contention is made by the plaintiff in error against the verdict and judgment on the ground that the evidence fails to justify it. In other words, they concede that so far as this court is concerned, there is sufficient evidence, though perhaps conflicting in some respects, to sustain the verdict, and with this goes, we think, a recognition of the legal merit of the verdict. All that is contended here is that the court did not sufficiently fully instruct the jury on the various *theories* of the defense and misled them as to the importance of some of the evidence in the case. We do not think this contention is sustained by an examination of the evidence and the instructions, and believe that the judgment should be affirmed.

Dated Sept. 30, 1904.

Respectfully submitted,

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